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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

Number 497

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ROWENA THORNTON, *Petitioner*

v.

CITY OF PORTLAND, OREGON, *Respondent*

■

Petition for Writ of Certiorari to the Supreme Court of Oregon

HAYDEN C. COVINGTON
Attorney for Petitioner

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Petition for Writ of Certiorari to the Supreme Court of Oregon

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Rowena Thornton, presents this her petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement*

The facts and problems presented for review herein are similar to those discussed by this Court in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158. But the issues, involving as they do "sacred private interests, basic in a democracy", are not disposed of by the *Prince* case because here are involved questions of vital moment which can never be thrust beyond judicial scrutiny by any one single pronouncement. Here again there is a clash of private constitutional rights of freedom of worship as against state police authority and the delicate task of resolving the conflict de-

volves upon this Court. The facts involved in this controversy, which arose prior to the *Prince* case, raise issues not previously disposed of and present a much more compelling situation with respect to those questions which were discussed in the majority opinion in the *Prince* case. Here the Supreme Court of Oregon has sanctioned the criminal sentence imposed on a mother solely upon the authority of this Court's decision in the *Prince* case and has wholly failed to perform the "delicate and difficult task [which] falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights". (*Schneider* v. *New Jersey,* 308 U. S. 147, 160) Petitioner now applies to this Court of last resort for a review of the facts in her case, and a reconsideration of the principles announced in the *Prince* decision, in order that the good ends of justice may be accomplished.

2. *Opinion of the Court Below.*

The opinion of the Supreme Court of Oregon is reported at — Oreg. —, 49 P. 2d 972, and is printed in the record at pages 254 to 258.

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, 28 U. S. C. 344 (b).

4. *Timeliness of the Petition.*

The judgment of the Supreme Court of Oregon was entered on June 27, 1944. [258]* The petition for writ of certiorari is filed within three months from the date of the entry of such judgment in said court.

5. *Ordinance Involved.*

The constitutionality of Section 16-903 of Ordinance

* Numbers hereinafter appearing in brackets refer to pages in the printed record in this case.

No. 76339 of the City of Portland, Oregon, as it has been construed and applied to the activity of petitioner and her minor daughter, is involved.

6. *Constitutional Provisions Involved.*

The First and Fourteenth Amendments to the United States Constitution protecting the right of freedom of worship are relied upon.

7. *Questions Presented.*

(1) Does the conviction deprive petitioner of liberty and property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, in that the judgment of conviction was entered without a finding that respondent

(a) clearly established by evidence the "existence of facts supporting the legislative judgment" so as to overcome the presumption of unconstitutionality which attaches to this ordinance by reason of its operating as a prima facie denial and infringement of the constitutional right of freedom of worship, and

(b) justified the operation of the ordinance by evidence clearly establishing that it was a reasonable means to the end sought to be accomplished and that it was not arbitrary, unreasonable or oppressive?

(2) Is the ordinance unconstitutional as construed and applied because it abridges and denies petitioner's right to educate, teach and direct the spiritual welfare of her daughter, to maintain a family and to discharge her moral obligations as mother while the child is denied the right to the benefits of such relationship, all contrary to the First and Fourteenth Amendments to the United States Constitution?

(3) Is the ordinance unconstitutional as construed and applied because it abridges and denies petitioner's and her daughter's freedom to worship Almighty God according to the commands of Jehovah and their freedom of conscience,

contrary to the First and Fourteenth Amendments to the United States Constitution?

(4) Is the ordinance unconstitutional as construed and applied because it abridges and denies petitioner's and her daughter's privileges, rights and immunities secured by the Constitution in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

(5) Do the judgments of the courts below deprive petitioner of her liberty and property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution, in that there is an absence of evidence in the record to establish that she violated the ordinance in question?

8. *How the Issues were Raised.*

At the trial in the Municipal Court of the City of Portland, [227-228] and later, at the trial in the Circuit Court for Multnomah County, [140-142] petitioner filed a motion to dismiss and for acquittal [140-142] raising, among other things, the constitutional questions heretofore listed. These grounds were considered and discussed by the trial court [180-226] and later by the Supreme Court of Oregon [256-258] but in both instances were decided adversely to petitioner.

9. *Statement of the History of the Case and the Facts.*

HISTORY

Petitioner, on March 10, 1942, was charged in the Municipal Court of the City of Portland with a violation of Ordinance No. 76339 of said city. After a trial was had on her plea of "not guilty", she was convicted and fined $25, in default of which, confinement in the City Jail of not more than 12½ days was to be imposed. [2] An appeal was timely taken to the Circuit Court for Multnomah County, and after a trial *de novo* before the court without a jury, petitioner

was again convicted and the same sentence imposed. [226] Petitioner then appealed to the Supreme Court of Oregon, but this court, after considering the briefs and argument of counsel, on June 27, 1944, affirmed the conviction. [258-259]

FACTS

Rowena Thornton is one of Jehovah's witnesses and an ordained minister of the gospel. [9-10] She explained that her work as a "witness, preacher and evangelist" was prophesied and described by Isaiah, another of Jehovah's witnesses who long ago declared:*

> '"Let all the nations be gathered together, and let the peoples be assembled: who among them can declare this, and show us former things? let them bring their witnesses, that they may be justified; or let them hear, and say, It is truth. Ye are my witnesses, saith Jehovah, and my servant whom I have chosen; that ye may know and believe me, and understand that I am he: before me there was no God formed, neither shall there be after me. I, even I, am Jehovah; and besides me there is no saviour. I have declared, and I have saved, and I have showed; and there was no strange god among you: therefore ye are my witnesses, saith Jehovah, and I am God." And that is what we are, Jehovah's witnesses.' [39-40]

She has a daughter, Brooke Thornton, eleven years of age, whom she has trained "in the nurture and admonition of the Lord" (Ephesians 6:4) as one of Jehovah's witnesses. [47-48, 81]

As one of Jehovah's witnesses, petitioner appeared regularly each week on the streets of the business section of Portland, Oregon, to preach the gospel of God's kingdom by public distribution of the *Watchtower* and *Consolation* magazines. [14, 19, 41, 45] On Saturday afternoon, March 7, 1942, petitioner, as was her custom, appeared on the south-

* Isaiah 43:9-12, *American Standard Version.*

west corner of Fourth and Stark streets, accompanied by her daughter, Brooke. Each of them carried a cloth magazine bag, hung from the shoulder by means of a strap. On the bag the following words were printed: "*The Watchtower*—Explains the Theocratic Government—5c per copy." [20-21; 78-79; 249; Pl. Ex. 3] Brooke took a position on the edge of the sidewalk a few feet from her mother and they began their work. [16, 94] Petitioner stated that she always kept very close surveillance over her daughter while they were on the street. [47]

As the normal flow of pedestrian traffic passed by them, petitioner and her daughter held in their hands copies of the two magazines so that they were visible to the passers-by. [18, 20, 77-79] Petitioner repeatedly stated when on trial that she and her daughter were not "selling" the magazines, explaining that the magazines were distributed to persons desiring same upon their request, but that if such persons desired to contribute five cents to assist in printing more like magazines, such contributions would be accepted and turned over to the Watchtower Bible & Tract Society. [21-26] This was verified by her daughter. [80] Petitioner stated that most of the magazines she and her daughter distributed were given away without receipt of contributions. [21] In such instances, petitioner carried the expense of approximately two and one-half cents per copy herself. [25, 114] This arrangement, used by Jehovah's witnesses generally, was clarified by Norman Larson, the *company servant* (supervising minister) of the Portland, Oregon, congregation of Jehovah's witnesses. [112-115] Brooke Thornton testified that she gave all the contributions she received to her mother, who "turns it in and helps publish more magazines". [78]

When asked what she was doing on the street with her mother on the occasion in question, Brooke answered: "I was preaching the gospel of the Kingdom which Christ Jesus taught all Christians to pray for. . . . I was there because I wanted to serve Jehovah. . . . To obey Jehovah

God. . . . At Acts 20: 20 it says to teach 'publicly and from house to house'. . . . I read it out of the Bible myself." She further testified that if she failed to obey God's commandments she "would not live in the Kingdom where all animals should be my friends. As it says in the Bible, 'The lion will lay down with the lamb.' [Isaiah 11: 6-9] I would not have everlasting life. . . . I would not have if I didn't obey God". [93]

It appears from the testimony that the *Watchtower* and *Consolation* magazines are not commercial publications. Both magazines are devoted exclusively to "Christianity and Christian teachings", and contain no commercial advertising. [54] *The Watchtower,* issued semi-monthly, deals entirely with Scriptural discussions of great concern to the people seeking knowledge of God's purposes toward mankind. [27] *Consolation,* A Journal of Fact, Hope and Courage, publishes news uncensored by any political, religious or commercial body, and contains Bible treatises as well. [27, 77] Both magazines were introduced in evidence.

Jehovah's witnesses look to the Watchtower Bible & Tract Society, a non-profit, charitable corporation, chartered under the laws of the State of New York, as their earthly governing body. The charter of this corporation [Ex. D. 108-110] shows that the sole corporate purpose of said Society is to disseminate information of and concerning God's Kingdom to people of good-will. This is accomplished by means of the printed page, radio, word of mouth, and various other means of advertising, all of which is carried on by Jehovah's witnesses in the public interest without hope of pecuniary return to any individual or group of individuals. [52-54, 119]

The uncontroverted evidence shows that both petitioner and her daughter are ordained ministers of Almighty God. Certificates of ordination from the Watchtower Society for each of them were introduced in evidence and marked Exhibits A and B. [10, 80, 115] The matter of ordination was explained by petitioner in these words:

> "Ordination simply means to be appointed, and God did not set any age limit on who he would appoint to be his witnesses. He says in John 15:16 that, 'Ye have not chosen me, but I have chosen you, that you might bring forth fruit.' And, of course, if we bring forth good fruit, as Jesus did, we are bringing forth fruits of the Kingdom. And in Psalm 8:2, he says, 'Out of the mouth of babes and sucklings I have ordained strength because of thine enemies, that thou mightest stop the mouth of the enemy and the avenger.' So the Lord gave these children strength to do what men had an opportunity to do but failed to do because of the fear of man." [29]

Petitioner also pointed out that Jesus, Timothy and the prophet Samuel were all ordained by Jehovah to preach while yet very young. [32, 42-43] Brooke Thornton testified concerning this matter: "When I got the knowledge of the Kingdom, that is when I became an ordained minister. . . . My mother showed me in the Bible where it said that, and it was up to me to make the decision." [101]

Although Brooke usually expressed her desire to accompany her mother on Saturday afternoons when she went to carry on her preaching activity by street distribution of the magazines, petitioners said that she permitted it only when the weather was fair. [16-17, 32, 47] On the afternoon in question, the weather bureau report received in evidence [Ex. C, 17, 18] showed that the weather was fair and mild. Petitioner further testified that she never allowed Brooke to stay home from school to engage in these ministerial activities, but always arranged for her to perform her service to God at times other than during school hours. [35-36] There was no contention on the part of the City in the courts below that petitioner forced her daughter to engage in the ministerial work but it was admitted that Brooke performed such service of her own accord with petitioner's permission. [82-91]

Rowena Thornton testified that Jehovah God was using His witnesses on the earth today to warn the people of the impending disaster of Armageddon in which God would for ever throw down all wickedness and establish His Theocratic Government. Speaking of this Theocratic Government Norman Larson said: "Theocracy is God's Government. The word 'theocracy', as you know, is taken from the Greek 'theo', meaning God, and 'kratos' meaning government. And God's Government is prophesied in the Garden of Eden, and it is prophesied down through the ages by all the prophets. You see prophesied the coming of the King. He came and was rejected. Well, he is coming again, and it is time now. We are in the transition period from the rule of Satan to the rule of Christ." [123] Rowena Thorton enlarged upon this matter to show her purpose in engaging in the ministerial work:

> "Absolutely a new government. The Lord says, 'Lo, I create a new heaven and a new earth' [Isaiah 65:17], a new heavenly rule and a new earthly rule. Satan has been the invisible ruler of this present evil world, as all the facts today testify. A new Theocratic Government, which Jesus taught us to pray for [Matthew 6:9, 10], is coming in, and that is why the nations are in the terrible turmoil they are now in world-wide. . . . The Lord says, 'The whole world lieth in the hand of the wicked one.' [1 John 5:19] He says, 'My Kingdom is not of this world; if my Kingdom were of this world, then would my servants fight, that I should not be delivered unto the Jews; but my Kingdom is hence.' [John 18:36] . . . There is many sincere people held in these religious systems that don't know one thing about their Bible, and God is now giving them the opportunity to know. He is giving them a chance to know what the message of the Bible contains, and if they do learn they have got to get out of religion [Revelation 18:4], because religion has never saved a nation yet." [56-58]

Reasons Relied on for Allowance of Writ

The petition for writ of certiorari should be granted in this case because of the fundamental constitutional issues of importance presented. Briefly stated, these issues involve:

(*a*) *Presumption of unconstitutionality and burden of proof.*

To general legislation governing the affairs of mankind, there attaches a strong presumption of constitutionality, and the burden is placed on the individual attacking the constitutional validity of the statute to overcome this presumption. There is, however, an important exception to this rule. The human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment, are presumed to be invulnerable, and any attempt to sweep away those freedoms is prima facie invalid. Any restriction or prohibition, therefore, must be justified by those who deny that the freedoms have been unlawfully invaded. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Busey* v. *District of Columbia,* 138 F. 2d 592; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152.

In this case, the courts below, under the guise of police authority, have admittedly construed and applied the ordinance in such a manner as to infringe and deny two of the most fundamental freedoms secured to the people: (a) parental freedom to rear children in accordance with God's Word, and (b) children's freedom to worship God by distribution of Bible literature on public streets. These are serious constitutional freedoms and cannot be lightly brushed aside. See pages 13-15, infra. Notwithstanding this, however, the courts below sanctioned the application of the ordinance without requiring the respondent City of Portland to establish by evidence the "existence of facts supporting the legislative judgment". The trial court improper-

ly assumed the existence of such facts because petitioner had not convinced the court beyond a reasonable doubt that there was "no reasonable basis for the same". [220-221] Although the question was not discussed in the opinion of the Supreme Court of Oregon, said opinion was based on this Court's pronouncements made in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158. It is significant to note that the majority opinion in the *Prince* case recognizes this contention, but wholly ignores the application of the rule in its decision, and violates the rule by presuming, *ipse dixit,* the existence of facts supporting the legislative judgment. See Mr. Justice Murphy's dissenting opinion in the *Prince* case. Therefore, not only are the rulings of the courts below in conflict with previous applicable decisions of this Court, but also there is an inconsistency between the rule applied in the *Prince* case and that recognized in *United States* v. *Carolene Products Co.,* 304 U. S. 152, and *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. These are, in themselves, sufficient reasons for the granting of the writ.

(*b*) *Inapplicability of "rational basis" test.*

This Court properly said in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640, "The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." See also *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152. The burden was therefore upon the respondent City to show that the ordinance was necessary in order to prevent *clear and present danger* to some interest it could lawfully protect. The respondent wholly failed to discharge this burden,

but, following this Court's pronouncement in the *Prince* case, the court below filled in this gap in the case against petitioner by presuming that the ordinance was a "proper exercise of the police power in that it tended to protect the health and moral welfare of children of tender years". [258] It is respectfully urged that it is not the proper function of the judiciary to settle complicated social questions such as the child welfare problem here presented by its own presumption and without the assistance of competent evidence in the record. There must be a positive finding based on competent evidence that the ordinance was necessary in order to protect the child from a *clear and present danger* of substantial injury to its health or welfare and that it was a reasonable measure to this end. To settle this important and basic question of judicial procedure the writ of certiorari should be granted.

(*c*) *No evidence of guilt in record.*

The Supreme Court of Oregon ruled that the finding of the trial court that petitioner's daughter was "selling" the magazines on the street was conclusive, and hence did not consider the evidence on that question, but ruled that petitioner came within the ordinance. [255] The work of Jehovah's witnesses precisely similar to that involved here has come before this Court for close scrutiny on many occasions. In *Murdock* v. *Pennsylvania,* 319 U. S. 105, 110, this matter was carefully considered and it was found that the evangelistic work of Jehovah's witnesses was not transformed into commercial selling merely because money transactions were involved. The Oregon Supreme Court's characterization of their work is plainly a "distortion of the facts of record". See also *Follett* v. *McCormick,* 321 U. S. 573, decided last term. The conclusion that petitioner's daughter was "selling" is not the ascertainment of the kind of fact that precludes consideration by this Court. *Baumgartner* v. *United States,* 64 S. Ct. 1240, 1244, and

cases there cited. The conviction of petitioner, being based on this "finding", deprives her of her liberty and property without due process of law, and is contrary to the applicable decisions of this Court.

(*d*) *Infringement of right of parental control of children.*

Without justification, the City of Portland has undertaken to prevent a mother from teaching her daughter, under the age of 18, the way she should worship Almighty God. This action has been sanctioned on the basis of this Court's opinion in the *Prince* case. Because there is a fundamental inconsistency between these rulings and the previous rulings made in *Pierce* v. *Society of Sisters,* 268 U. S. 510, and *Meyer* v. *Nebraska,* 262 U. S. 390, the writ of certiorari should be granted. The doctrine of *parens patriae* has been extended far beyond its proper constitutional scope.

(*e*) *Infringement of child's right to benefit from parental control.*

Not only does this decision operate to prevent the mother from teaching the child in the way it should go, but it likewise makes it impossible for a girl under the age of 18 years to look to her parents for truthful and reliable counsel as to the proper manner to worship God. This deprives the child of proper preparation for "obligations the state can neither supply nor hinder", namely, her obligation to her Creator. In the absence of a *clear and present danger,* which results from the activity of worship, this is an under infringement of the child's constitutional rights.

(*f*) *Infringement of freedom of worship.*

It is noticeable that the ordinance, as it has been construed and applied to petitioner's daughter, is not an ordinance regulating her conduct in distributing the magazines on the street, but is an absolute prohibition on such activity.

The respondent City has, in effect, declared by this ordinance that girls under the age of 18 cannot worship God except as the City, as *parens patriae,* shall approve. The difference between the prohibition here and the one struck down in *Lovell* v. *Griffin,* 303 U. S. 444, is that here the ordinance applies only to an age group and does not so much as allow for the activity to be carried on with an administrative permit. Justification for the restriction is sought under the guise of protecting the health and welfare of children. Speaking of the sanction of such laws announced by the majority of this Court in the *Prince* Case, Mr. Justice Jackson, dissenting, said, " . . . a foundation is laid for any state intervention in the indoctrination and participation of children in religion provided it is done in the name of their health and welfare." Truly the operation of this ordinance cuts across the most valuable right of the youngster, that is, his right to learn to worship Jehovah God and thus gain life everlasting. Moreover, the divine obligation of the parents to rear their children in the "nurture and admonition of the Lord" is greatly impaired and infringed by this decision. The ordinance is an infringement because its harsh operation has been sanctioned by the courts below without any evidence of a *clear and present danger* to the child's welfare on account of the activity. *Bridges* v. *California,* 314 U. S. 252, 262.

(*g*) *Infringement of equal protection clause.*

As construed and applied by the court below, the ordinance discriminates against Jehovah's witnesses and their children in that it arbitrarily prohibits girls under 18 years of age and boys under 10 years of age from worshiping God by distribution of Bible literature on the streets, as it is their constitutional right to do, and at the same time allows other children to wander about the streets having no occupation. The classification thus made is not upon any ground of difference having a fair and substantial relation to the police powers of the respondent city; therefore all persons

in the same class cannot be treated alike. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417; *Ward* v. *Maryland,* 79 U. S. 418; *Yick Wo* v. *Hopkins,* 118 U. S. 358.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Supreme Court of Oregon directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of the said Supreme Court of Oregon, affirming the judgment of conviction entered by the Circuit Court for Multnomah County, Oregon, be here set aside and petitioner dismissed from custody; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

ROWENA THORNTON
Petitioner

By HAYDEN C. COVINGTON
Attorney for Petitioner

BRIEF

in Support of Petition for Writ of Certiorari

Specification of Errors

The petitioner assigns the following errors in the record and proceedings of said cause:

1. The conviction deprives petitioner of liberty and property without due process of law contrary to the Fourteenth Amendment to the United States Constitution in that the judgment of conviction was entered without a finding that respondent clearly established by evidence the "existence of facts supporting the legislative judgment" so as to overcome the presumption of unconstitutionality which attaches to the ordinance by reason of its operating as a prima facie denial and infringement of the constitutional right of freedom of worship.

2. The conviction deprives petitioner of liberty and property without due process of law contrary to the Fourteenth Amendment to the United States Constitution in that the judgment of conviction was entered without a finding that respondent justified the operation of the ordinance by evidence clearly establishing that it was a reasonable means to the end sought to be accomplished and was not arbitrary, unreasonable or oppressive.

3. The ordinance is unconstitutional as construed and applied because it abridges and denies petitioner's right to educate, teach and direct the spiritual welfare of her daughter, to maintain a family and to discharge her moral obligation as mother, while the child is denied the right to the benefits of such relationship, all contrary to the First and Fourteenth Amendments to the United States Constitution.

4. The ordinance is unconstitutional as construed and applied because it abridges and denies petitioner's and her daughter's freedom to worship Almighty God according to the commands of Jehovah and their freedom of conscience,

contrary to the First and Fourteenth Amendments to the United States Constitution.

5. The ordinance is unconstitutional as construed and applied because it abridges and denies petitioner's and her daughter's privileges, rights and immunities secured by the Constitution, in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

6. The conviction deprives petitioner of her liberty and property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution in that there is an absence of evidence in the record to establish that she violated the ordinance in question.

ARGUMENT

An appreciation of the problem presented by the "due process clause" must begin by realizing that what the combined effect of the First and Fourteenth Amendments has done is to place upon the Court the duty of weighing the specific individual interests comprehended under the terms freedom of speech, freedom of press, freedom of worship, and freedom of assembly, as against the claims of society and of the state which are subsumed under the general phrase, the "police power". The work of examining, valuing and balancing these conflicting claims cannot be accomplished by a tired-eyed scrutiny of the words of the Constitution nor by attempting to limit and stake the boundaries of the police power. The task can be done only by careful analysis of the concrete interests involved, proceeding with the aid of certain legal postulates adopted in the fields already traversed.

Among the most frequently utilized of these postulates is that denominated "presumption of validity", which is applied to legislative declarations. Piloted by this presumption, the Court has, within recent times, resolved many con-

troversies arising under the general terms "liberty" and "property" of the Fourteenth Amendment.

However, in the instant case, a new problem is presented because the nebulous character of these terms finds dynamic reality in the specific language of the First Amendment which places the basic franchises of human freedom in a preferred position. An additional postulate thus becomes necessary to prevent the very real possibility of a gradual process of emasculation of the first Amendment by legislative enactments based upon a fictional need of police authority. Such protection of the "four freedoms" can be achieved only by surrounding them with a *presumption of invulnerability.* Applying such a presumption, the judiciary rightfully becomes the jealous guardian of freedoms which have no other defender. So-called "police legislation", which either on its face or as construed and applied, infringes on the domain of these freedoms is at once thrown back, if those who seek to enforce its restraint fail to surmount the presumption of invulnerability by establishing (1) the existence of facts supporting the legislative judgment (a clear and present danger to the child's welfare) and (2) that it is a reasonable means to the end sought to be accomplished and is not arbitrary, unreasonable or oppressive.

In this case, a conflict has arisen between a child's constitutional right of freedom of worship on the one hand, and an ordinance enacted under the state's interest as *parens patriae* pursuant to its police authority on the other. The state has made no attempt to establish the necessity of the restrictive ordinance by evidence showing the existence of facts supporting its legislative judgment nor has it attempted to prove the reasonableness of the ordinance by showing that the restriction was a reasonable means to the end it seeks to accomplish and not arbitrary, unreasonable or oppressive. Thus the issue is squarely presented: *Does the police authority asserted in derogation of free enjoyment of the rights secured by the First Amendment find constitutional justification in legislative declarations and*

judicial presumptions, or, on the contrary, is it justified only by evidence establishing the reasonableness of its operation and necessity of its object by proof of a serious, clear and present danger?

This is a federal question of fundamental importance, and one which has never before been directly passed on by this Court. In none of the many cases involving the "due process" clause of the Fourteenth Amendment has this question been decided, although there have been some strong allusions in the dictum of a few opinions. But the dictum has not entirely clarified the problem which has been squarely raised in this case. The majority opinion in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158, decided last term, did not reach this important problem, even though facts in *this* case present a similar situation.

An examination of the record discloses that the courts below did not apply the "presumption of invulnerability" in favor of the constitutional right of freedom of worship. [220-221] Hence petitioner now says that she has been deprived of her liberty and property without due process of law.

The correct statement of the law regarding the application of the presumption is mentioned by Mr. Justice Jackson in *The Struggle for Judicial Supremacy* (New York, Knopf, 1941) at page 285:

> "The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech, free press and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its

> most vital point. In that event, the Court, by intervening, restores the processes of democratic government; it does not disrupt them."

This rule applies with much greater force of reason to freedom of worship not mentioned in the above quotation. That any individual's right to worship God should be made dependent on the ballot box or pressure of opinion is manifestly repugnant to the constitutional system, and this Court so declared. (*West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640) Religious minorities have no voice in the ballot box nor arm of force to mold public opinion. The judiciary is the ultimate guardian of the people's freedom to worship. Thus far, the judiciary in this case has failed to protect petitioner's freedom of worship.

With due respect to the Court, it nevertheless appears that the technical and complicated problem of child welfare is not so well settled and generally acknowledged that any particular conclusion from the facts here will admit of judicial notice. Without expert evidence—or any evidence—showing the result of the activity upon the health and welfare of a child, how can any court rule as a matter of law that it is detrimental? This is not a proper judicial function. If the City of Portland had any proof that the health of the child was being impaired, it should have introduced competent testimony to support this part of its case, instead of submitting it upon the court's suggested stipulation.

In situations of this kind, the Court has many times relied upon scientific testimony to resolve the difficulty and

the present tendency is in that direction.* "Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it." *Mutual Loan Co.* v. *Martell,* 222 U. S. 225, 233. Mr. Justice Holmes declared in *Otis* v. *Parker,* 187 U. S. 606, 608, that "the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts".

That the child in this case was endangered by the activity, under the circumstances shown in the record, certainly lacks a "probable basis in fact". Evidence bearing upon the question of whether or not the activity was detrimental to health or morals would be more readily accessible to the City than to the citizens. Justice dictates, therefore, that it was the burden of the respondent city to prove by competent evidence to what extent, if any, the activity was injurious to petitioner's daughter.

In his dissenting opinion filed in the *Prince* case, Mr. Justice Murphy pointed out that the Commonwealth of Massachusetts had not discharged the burden of proof it carried in rebutting the presumption of invulnerability that attaches to the right of freedom of worship. He said, "In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. . . . On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be

* See *Muller* v. *Oregon,* 208 U. S. 412, 419-420; *McLean* v. *Arkansas,* 211 U. S. 539, 548-551; *Price* v. *Illinois,* 238 U. S. 446, 453, for instances of the Court's use of factual testimony. Mr. Justice Brandeis employed such material extensively. See his dissents in *Adams* v. *Tanner,* 244 U. S. 590; *Truax* v. *Corrigan,* 257 U. S. 312; *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504. In *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, the Court remarked upon the failure of those arguing for the constitutionality of the District of Columbia rent law to show a continuation of the emergency which had justified the law's existence. The tendency of the Court to make use of scientific testimony has been generally applauded. See Frankfurter, "Hours of Labor and Realism in Constitutional Law." (1916) 29 Harv. L. Rev. 353.

presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the State of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case. . . . The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect."

Had the majority of this Court in the *Prince* case applied the presumption in favor of the challenged freedoms, and scrutinized the record for "evidence in support of the legislative judgment", it would have been found that Mr. Justice Murphy's appraisal of the record is correct. However, the majority opinion of the Court did not discuss the matter of presumption, and hence that opinion does not foreclose this issue here. Furthermore, that the permissible sphere of the state's police power may be larger as respects children than with adults does not at all bear on the question presented in this case. Here, the principal issue is whether or not the state has succeeded in establishing justification for the prohibition it has placed on petitioner's daughter's manner of worship of Almighty God.

The rule discussed by Mr. Justice Murphy in his dissenting opinion in the *Prince* case was effectively applied by the United States Court of Appeals for the District of Columbia in *Busey* v. *District of Columbia,* 138 F. 2d 592, decided November 8, 1943. In that case an occupational license tax was sought to be applied to the activity of Jehovah's witnesses. The controversy reached this Court last term after the precedent case of *Murdock* v. *Pennsylvania,* 319 U. S. 105, had been decided. The case was remanded to the Court of Appeals for further consideration. (319 U. S. 579) Upon reconsideration, Mr. Justice Edgerton, speaking for the court (p. 595), held:

"Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty.' (*Palko* v. *Connecticut,* 302 U. S. 319, 325) They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. (Civil liberties are at present relatively little threatened by governmental action, but in many communities the civil liberties of unpopular groups are greatly threatened by private terrorism. Legal recognition of these liberties tends to discourage this terrorism.) . . .

"*We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed;* at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. *The burden of proof in such a case should be upon those who deny that these freedoms are invaded.* . . . No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms." [Italics added]

The decision of this Court in *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, followed this same rule:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg* v. *California,* 283 U. S. 359, 369-370; *Lovell* v. *Griffin,* 303 U. S. 444, 452."

In this same connection the words of Mr. Justice Roberts in *Schneider* v. *New Jersey,* 308 U. S. 147, are appropriate on the issues here presented, to wit:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

In this enclosure of civil rights and fundamental personal liberties secured by the express guarantees of the First Amendment to the Constitution, there is not established a broad channel in which the government and the courts may operate according to their discretion. The people, by these specific constitutional provisions, have definitely narrowed the channel of regulation and government activity and walled them in by high banks of rock on both sides of the governmental waters. This is to prevent a change of course of the stream and to keep the way straight and narrow. If the government gets out of its fixed course in these precious fields, there immediately arises a presumption of invalidity and unconstitutionality to throw back the stream of regulation into the fixed channel properly made by the people through their Constitution.

The construction and application given to the ordinance by the court below are mere flood waters which are out of the course established by the people. They should be rightly returned to their proper place and recede from the field of fundamental personal liberties belonging to petitioner.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be sub-

mitted to vote; they depend on the outcome of no elections.

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First becomes its standard. The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." (Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640.)

The judicial branch of the government rather than the legislative authority must decide when freedom of worship and freedom of maintaining a family must yield to the police power, and in performing this task this court must make a deeper inquiry than when property rights are involved.

"Mere legislative preferences for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative

that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." Murphy, *J.*, *Thornhill* v. *Alabama,* 310 U. S. 88.

In *Schneider* v. *New Jersey,* 308 U. S. 147, it is said: "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Performance of this task cannot be presumed to have been undertaken by the legislature in the passage of the acts or laws which they pronounce. So long as legislators and those who apply and enforce the laws are perfect, are free from factional interests, are magnanimous and virtuous and without outside influence, it may be presumed that the circumstances warrant finding of constitutionality. But the plan of this government for an independent judiciary assumed that the legislators and enforcers of the law would not be so Utopian and contrary to uniform experience. Therefore the courts were created to weigh and decide conflicts between governor and governed on the theory that men and legislators and police will be as they are, imperfect, and not as they would be if they were perfect, free from vice and error.

This question has also been dealt with in *older days* by a well-known New York judge in the case of *Taylor* v. *Porter,* 4 Hill (N. Y.) 140, 143. If sustained, the effect of the principle applied by the courts below would be that a high and almost impregnable wall would be built around all ordinances turned out by the City Council. Citizens prosecuted under those ordinances would soon discover that the constitutional rights they have always regarded as being secure, above and beyond the power of legislative abrogation, would not be available to them until they were able to scale this wall of presumption by producing in court a preponderance of the evidence showing that these rights

have been infringed by the ordinance. In a case involving the highly debatable and technical issue of child welfare this presumption in favor of the ordinance might well govern the conclusion of the case and the definition of the fundamental right. This is to put the most cherished possession of all Americans at a definite disadvantage. Henceforth citizens would be dragged into court with their freedoms held in their hand, so to speak, and if they were not strong enough to protect these freedoms from the grasp of the prosecution seeking to wrest them away, then liberty would die an untimely death right in the courtroom, which has heretofore been the arena for the protection of these rights. Weakened immeasurably by the presumption against the freedoms even before reaching the courtroom, these freedoms would, like so much sand, soon slide through the fingers of the much-prosecuted citizenry, leaving the exalted police power supreme—as in Hitler's crumbling *reich*. If liberty is to be preserved and secured, then judicial presumptions must be in its favor and not, as here, in derogation of the cherished "four freedoms".

Until the respondent has discharged its duty, by proving a clear and present danger of substantial evils to the child from the activity which petitioner permitted her to engage in, the conviction cannot be sustained. In holding that the clear and present danger test must be applied to police-power abridgments of the liberties protected by the First Amendment the United States Supreme Court, in *Bridges* v. *California,* 314 U. S. 252, 262-263, 273, said:

"Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in *Whitney* v. *California,* supra, 274 U. S. at 374; it must be 'serious', *id.* 376. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight

to warrant the curtailment of liberty of expression. *Schneider* v. *State,* 308 U. S. 147, 161.

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press'. It must be taken as a command of the broadest scope that explicit language, read into the context of a liberty-loving society, will allow. . . .

"In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here."

It is not contended that Brooke Thornton was engaged in any more hazardous activity while in the custody and control of petitioner than were the many children who were at the time on the public sidewalks of Portland accompanying their parents while shopping, window-shopping, going to and from the theater, etc. It is not urged that the child was unattended or abandoned by petitioner upon the public streets. Indeed it could not so contend because of the record. It is not urged that the activity caused the child not to be sociable with other children. It is not said that the child was truant from school or neglectful of studies. There is no showing that the activity of the child caused her to be stolid, intolerant or unresourceful. The activity did not in any way impair the education, morals, welfare, physical or mental capacity of the child nor did it adversely affect any interest of the state. The act of worshiping Almighty God and preaching, benevolent as it is to mankind, must be

said to be more conducive to the well-being of a child than staying at home, accompanying parents to do shopping, or any other activity. It cannot be argued that any of the baneful results aimed at by the ordinance will follow.

Equally important, the conviction deprives petitioner of liberty and property without due process of law, contrary to the Fourteenth Amendment, in that the judgment of conviction was entered without a finding that respondent justified the operation of the ordinance by evidence clearly establishing that it was a reasonable means to the end sought to be accomplished and was not arbitrary, unreasonable or oppressive.

That an absolute prohibition such as that invoked against the public distribution of Bible literature by children such as petitioner's daughter could possibly further the interests of the state in preventing the evils of juvenile delinquency and child labor, is utterly preposterous.

The wave of juvenile delinquency that has swept the nation in fever of war is an alarming fact of which this Court will take judicial notice. Reckless and lawless gangs of teenaged youths loiter about the streets indulging in all manner of depravity. Pressed by an employment shortage, unscrupulous employers resort to illegal exploitation of child labor, resulting in a multitude of social derangements.* Every person possessed of his faculties of perception realizes that mere strict enforcement of laws against these practices as a remedy is as futile as seeking to prevent bodily ailments by punishing those who are taken ill. Now, in this time of world upheaval, the people, caught in a whirling maelstrom

* J. Edgar Hoover, Director of the F. B. I., attributes the appalling rise of juvenile delinquency to a lack of "certain fundamentals" in the growth of American youth, and sets forth an interesting statistical picture of the present situation. *Congressional Record,* Dec. 3, 1943 (p. A5642).

of violence pulling them to a vortex of social abnormalities, are in desperate need of the moral stabilization afforded by the comforting words of assurance from the Holy Bible.* Yet, the ordinance has been so construed as to permit the arrest and prosecution of a loving Christian parent who has raised her children to believe in and respect the law of Almighty God. By grotesque misapplication of social ordinances, it is made a crime for a clean-minded youngster to hand to another child or to an adult on the public street a publication announcing the establishment of Christ's blessed Kingdom of Righteousness that will for ever lift mankind out of the filth and mire of social debasement in which millions of people of all nations now wallow. Under the misapplied ordinance, so heinous is the offense of this little girl in distributing Bible literature pointing mankind to the only way in which they can enjoy these promised blessings, that the parent who permitted it is dragged to jail and threatened with the enforcement of the further sanctions of the ordinance permitting the officials to ravish the Christian home by rending asunder the parental relationship and placing the child in the custody of the judge of the juvenile court for Multnomah County.

Certainly an ordinance that would require the police to drag off to jail an upright little Christian girl and her mother unselfishly engaged in a work of the greatest importance to mankind is an utterly unreasonable assertion of police power, especially when it is considered that they are dragged off as culprits while juvenile truants, idlers and pranksters look on. The harsh consequences of an ordinance requiring the filling of the jails with Christians instead of criminals would soon reflect itself upon the community, and instead of abating the increasing number of

* In a case involving Jehovah's witnesses, the Florida Supreme Court declared concerning the social duty of the church, "Herein lies the obligation of the church and the press to point each generation the way to these virtues, and failing in this, they fail in their debt to the Bill of Rights." *Florida ex rel. Singleton* v. *Woodruff*, — Fla. —, 13 S. 2d 704.

juvenile delinquencies, idleness and godlessness would be encouraged.

These anomalies are called to the Court's attention to illustrate the gross unreasonableness of the ordinance as construed and applied by the courts below.

Conclusion

The controversy here is in the "no man's land" between personal constitutional freedom and the police power of the state. Petitioner has shown that the activity complained of results from her duty as a loving parent to train her child in obedience to the commandments of Almighty God and to allow the child to worship God as commanded in the Bible. She has shown that her activity and that of her daughter come squarely within the guarantee of freedom of worship secured by the First Amendment to the United States Constitution. Against this right, the state has attempted to assert its contrary right of *parens patriae* over the child by virtue of its police power. But the state has failed to justify its attempted denial of freedom of worship, and it is found that the state has transgressed the permissible bounds allowed by the Constitution.

To restore the fundamental constitutional right of freedom of worship to its proper sphere of supremacy and to clarify the law governing the burden of proof in such controversies, this petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON
Attorney for Petitioner

(21)

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In

The Supreme Court

of the United States

OCTOBER TERM, 1944

No. 497

ROWENA THORNTON,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LYMAN E. LATOURETTE, City Attorney,
JOSEPH O. STEARNS, JR., Acting Chief Deputy City Attorney,
Attorneys for Respondent.

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STATEMENT OF THE CASE

On March 10, 1942, the petitioner, Rowena Thornton, was charged in the Municipal Court of the City of Portland, Oregon, with a violation of Ordinance No. 76339 by permitting her daughter, a minor girl ten years of age, to expose and offer for sale on the street of said city a magazine (Tr. p. 1). Upon being tried she was found guilty

on October 27, 1942, when a fine of $25.00 was imposed. She appealed to the Circuit Court of the State of Oregon for Multnomah County, where she had a trial de novo on July 8, 1943, was found guilty and fined $25.00 (Tr. pp. 4-233). She then appealed to the Supreme Court of Oregon, where the case was argued and submitted on June 6, 1944. An opinion was rendered on June 27, 1944, affirming the judgment of the lower court (Tr. pp. 253-260, and see 49 P. (2d) 972).

POINTS, AUTHORITIES AND ARGUMENT

The respondent objects to the issuance of a writ of certiorari on the grounds: (1) that the Supreme Court of Oregon has not decided a federal question which has not been heretofore determined by this court; (2) that the decision of the Supreme Court of Oregon is in accord with applicable decisions of this court, and (3) that the points presented in the petition and accompanying brief fail to show any adequate ground for this Court to issue the writ of certiorari.

(1) *This court has fully determined the questions raised by the petition.*

On January 31, 1944, in the case of *Sarah Prince v. Commonwealth of Massachusetts,* 321 U. S. 158, 88 L. ed. 403, 64 Sup. Ct. 438, this Court squarely passed upon a statutory

provision almost identical with the ordinance provision here challenged, and held it constitutional. The statute there before the court provided: "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspaper, magazine, periodical or any other articles of merchandise of any description * * * in any street or public place," and that "any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of the above provision, shall for a first offense be punished by a fine of not less than $2.00 nor more than $10.00 or by imprisonment for not more than five days, or both * * *."

The ordinance provision here challenged by the petitioner provides that it shall be unlawful for any "parent, guardian, custodian or person having charge or control of any boy under the age of ten years or any girl under the age of eighteen years to permit any such boy or girl to sell, expose or offer for sale on any street any newspaper, magazine or periodical * * *." (Tr. pp. 152 and 245).

The opinion of Judge Tooze, who presided at the trial in the Circuit Court for Multnomah County, was rendered before the opinion of this court in the Prince case. It is printed in full on pages 143-226 of the transcript.

The argument before the Supreme Court of Oregon in behalf of Rowena Thornton placed special emphasis upon

provisions of the Oregon Constitution which were claimed to be stronger in favor of Mrs. Thornton than the provisions of the Federal Constitution. This point was developed especially for the purpose of avoiding the decision of this court in the Prince case. The Supreme Court of Oregon on this subject said: (See Tr., appellant's abstract, par. 56)

> "Since the appeal was perfected in this court, the Supreme Court of the United States, on January 31, 1944, in *Sarah Prince v. Commonwealth of Massachusetts,* 321 U. S. 158, 88 L. ed. 403, 64 S. Ct. 438, sustained the validity of sections 80 and 81 of the child labor law of Massachusetts * * *. The Prince case involved the Jehovah's Witnesses and is based upon a similar factual situation. It was urged there, as here, that such exercise of the police power infringed upon freedom of worship as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The Supreme Court, however, held that the enactment of the statute was a reasonable exercise of the police power and that it was not forbidden by the Fourteenth Amendment. Counsel for appellant, with commendable frankness, concede that the Prince decision is controlling and is adverse to their contentions based upon alleged violation of the federal Constitution, but nevertheless contend that, under the Constitution of this state, defendant is entitled to relief against infringement of her religious liberty."

The Supreme Court of Oregon further held that the constitutional provisions of Oregon were similar to the Federal Constitution provisions in the particulars mentioned.

The decision in the Prince case was therefore followed. From the above it follows that the state court has not decided a federal question not heretofore determined by this court.

(2) *Nor did the Oregon courts decide the question in a way probably not in accord with applicable decisions of this court.*

The freedoms mentioned in the 1st Amendment of the Federal Constitution and protected against state infringement by the 14th Amendment do not override the police power of the state when reasonably exercised, even though such exercise of police power places certain restraints upon the free exercise of religion or abridge the freedom of speech or the press. This court in the Prince case very well said:

> "And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community

or the child to communicable disease or the latter to ill health or death."

In 11 American Jurisprudence at page 969 (Constitutional Law, sec. 245) it is said, concerning police power:

> "The breadth and extent of the power, covering the exigencies confronting the community, its adaptability, durability, inalienability, and the number of public purposes included in its scope make it a principal pillar of government. It has been stated that the police power in effect sums up the whole power of government, and that all other powers are only incidental and ancillary to the execution of the police power; it is that full final power involved in the administration of law as the means to the attainment of practical justice. Moreover, it has been said that the very existence of government depends on it, as well as the security of the social order, the life and health of the citizen, the enjoyment of private and social life, and the beneficial use of property."

As concerns the relationship between constitutional rights and police power the same article at section 259 reads:

> "A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not rendered invalid by the fact that it may affect incidentally the exercise of some right guaranteed by the Constitution. For example, it is said that the proper exercise of the police power is not subject to restraint by constitutional provisions designed for the general protection of rights of individual life, liberty and property. * * *."

And at page 1139 (sec. 330) we read further:

> "Constitutional liberty is always a relative term and, at most, means liberty regulated by just and impartial laws; in other words, such liberty is natural liberty so far restrained by human laws as is necessary and expedient for the general advantage of the public. It implies the absence of arbitrary restraint, and not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

At sections 255 and 256 it is shown that police power exists in the various states which may in turn authorize its exercise by municipal corporations within the state, and it is said that the power "appears to be impliedly granted to every municipal corporation from the mere fact of its organization as a government subdivision."

At pages 1007 and 1008 (sec. 267) we read further:

> "It cannot be disputed that, broadly speaking, the legislature may enact laws regulating, restraining, or prohibiting anything harmful to the welfare of the people, even though such regulation, restraint or pro- of a feeble-minded mother and the mother of a individual, because it may consider the relation of rights, accommodate their co-existence, and, in the interests of the community, limit one right that others may be enjoyed. The rights of the individual are, therefore, subordinate to the welfare of the general public. If the police power is properly exercised, it is immaterial that it operates harshly on some individual or causes him inconvenience or loss. Citizens may, for the public good, under some circumstances, be re-

strained in their conduct even with reference to matters in themselves lawful and right."

Page 1140 (sec. 331): "Thus, without violating the constitutional guaranty of liberty, the state may forbid one to make use of polluted water for drinking purposes, may provide for the sterilization of a feeble minded inmate of a state institution who is the daughter of a feeble-minded mother and the mother of an feeble-minded child, may prohibit one, under penalty, from becoming a member of a secret, oath-bound association which has not filed a copy of its constitution, by-laws, rules, regulations, and oath of membership, and the roster of its membership, and may prohibit the publication of information which would have a tendency to induce people to gamble. * * *."

(Page 1141): "It is often difficult to draw the line between the rights of the citizen to pursue and enjoy liberty and to seek and obtain happiness, on the one side, and the right of the state to enact laws in the general interests of all the people, on the other side. The prevailing view is that individual rights must yield to proper and reasonable regulation imposed for the best interests of the entire community."

The decision of this court in *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330, illustrates the principles above stated, where the court in upholding the validity of a statute fixing minimum wages for women, speaking by then Mr. Chief Justice Hughes, said: (Page 391 of 300 U. S.)

"Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. * * *.

(Page 395): "We concluded that the limitations which the statute there in question 'placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor' were 'not imposed solely for her benefit, but also largely for the benefit of all.' "

And at page 398 the court quotes from *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469 where a statutory provision fixing the minimum prices for milk was sustained, saying:

"If such laws 'have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied;' that 'with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal;' that 'times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom

of the law, it may not be annulled unless palpably in excess of legislative power.' "

The ordinance provision here under consideration is manifestly an exercise of police power. It looks to the safety and well-being of young children. It is intended to give them a measure of protection against the bad effect of work, evil influences and danger of accident on a public street in a large city. The evidence in this case shows that the petitioner's daughter was located on a heavily travelled street in the business district of a city of more than 300,000 inhabitants. The occasion was an entire Saturday afternoon, March 7, 1942 (Tr. p. 34)—a time when street traffic was likely to be heavier than at other times; that the daughter was stationed near a pool hall, a barber shop and an establishment operated by a gypsy phrenologist (Tr. pp. 94-97). If the parent may select a place of this character for her daughter to stand, then she may select a place in front of a drinking establishment or a place largely patronized by immoral and degraded people. There is nothing to prevent an evil-minded man from purchasing a magazine held out by the petitioner's daughter and at the same time inviting the daughter to meet him at an appointed time and place, or slip her a note which will excite her curiosity sufficiently to cause her to meet him. A child of such immature years should not be placed in a position where she will be likely to hear and see things that will direct

her thoughts toward evil. She should not be where she is liable to be jostled and perhaps injured by grown persons who are hurrying to reach a conveyance or place of appointment. She should not be placed on streets where she will discommode the normal flow of traffic even though she be "preaching the Gospel" by holding out magazines such as "Consolation" and "Watchtower".

It is insufficient to say that the mother accompanied the child and would have protected and guarded her. Even if it be presumed that the petitioner would have had the purpose to do so, it is not apparent that she would have fully succeeded, and it does not appear that other mothers would have accompanied their children on similar errands or that they would have exercised as much judgment and discretion as the petitioner might exercise.

It is insufficient to say that other children accompany their mothers when on shopping errands, for at such time the mothers and children are moving and remain on the street but a short time. The child is not stationed and left standing in front of a gypsy phrenologist's place of business, or in front of other places which excite suspicion and evil thoughts.

Furthermore, the city, the state and the nation is especially interested in the welfare of its children, because they are the future citizens. They should be given the

opportunity to play with other children at times when they are not in school or engaged in essential home work, for thus they develop health and strength, and a personality which is not warped or distorted and which is alert, co-operative and capable. A child who engages in sports with other children on Saturday afternoons and at other proper times, learns how to avoid the unpleasant personalities of others, becomes resourceful, and develops an active and strong mind and body, whereas a child who is overworked or is subjected to a monotonous routine like standing on the street for hours at a time holding magazines out for sale (or as petitioner claims for "distribution") is likely to become stolid and grow up with a resentful mind, an inferiority complex, and thus be lacking in the elements of good citizenship.

From the above we respectfully maintain that the law as followed by the Supreme Court of Oregon in reliance upon the decision of this court in the Prince case affirming the decision of the Supreme Court of Massachusetts (*Com. v. Prince*, 313 Mass. 225, 46 N. E. (2d) 755) is in accordance with the law previously announced by this court in other cases, and by other courts. The case as decided by the Supreme Court of Oregon is therefore in accordance with the applicable decisions of this court.

(3) *Review of points advanced by petitioner.*

This brief should not be closed without briefly reviewing the points advanced in behalf of the petitioner.

On pages 10, 17, and 20-29 of the petition and brief the point is advanced that the conviction deprives the petitioner of liberty and property without due process of law in that the judgment of conviction was entered without a finding of facts clearly supporting the legislative judgment "so as to overcome the presumption of unconstitutionality which attaches to this ordinance by reason of its operation as a prima facie denial and infringement of the constitutional right of freedom and worship."

We have seen from the above that there is no presumption of unconstitutionality with respect to legislation of this character. On the contrary, the legislative branch of the government is presumed to have acted upon proper information and that conditions existed which warranted the legislation unless the case be such that the court from its own investigation can see beyond doubt that the legislation is wholly unreasonable, and adapted to no valid purpose within the police power of the state or city.

Aside from what this court has said in the Prince case and other cases above cited, we call attention to the following which strongly support our position that legislative action is presumed to be constitutional and valid; that the

burden is on him who challenges its constitutionality to show by such clear proof as to leave no room for doubt concerning its invalidity, and that in the absence of such showing the legislation will be sustained.

In 16 Corpus Juris Secundum 517, "Constitutional Law", section 198, the law is thus stated:

> "In passing on the validity of statutes purporting to have been enacted under the police power, the courts must disregard all matters that relate to the wisdom or policy of the act, and may declare the act void only when it clearly appears that it bears no real or substantial relation to the police power, or the means adopted for effecting the object are manifestly arbitrary and unreasonable; they cannot review the economics or facts on which the legislation based its conclusions that an existing evil should be remedied by an exercise of the police power."

Many authorities are cited supporting this statement, including *Jones v. City of Portland* (Me.), 245 U. S. 211, 62 L. ed. 252, 38 S. Ct. 112, L.R.A. 1918C 765, Ann. Cas. 1918E 660, affirming 113 Me. 123, 93 Atl. 41.

In 11 American Jurisprudence, pages 1088 and 1089 (Constitutional Law, sec. 306) the principle is thus stated:

> "All general principles relating to the presumptions of validity surrounding legislation, and to the duty of courts to uphold the legislative action if possible, apply with particular emphasis to exercises of the police power. The constitutionality of such measures is presumed, and it must also be presumed that the legis-

> lature has carefully investigated and determined that the interests of the public require such legislation, for the courts are reluctant to attribute a want of good faith in the exercise of the power. Moreover, it is their duty to sustain police measures unless such are clearly, plainly and palpably in violation of the Constitution. It is not enough that the case is a doubtful one; the act must be so clearly unreasonable that the court can say that no fair minded man can think it reasonable. An earnest conflict of serious opinion does not suffice to bring such an act within the range of judicial cognizance. Furthermore, a statute enacted for the protection of the public health will be upheld if by any fair construction it has a tendency to effect its object. * * *."

Many decisions by this court and by other courts are cited in the footnotes accompanying the above.

Petitioner has failed to cite any decisions contrary to the above, and we are unable to see how one branch of the government, viz., the judicial, could reasonably adopt a presumption that another branch of the government, viz., the legislative, has acted without proper information or in disregard of constitutional rights when enacting police legislation.

At page 20 of petitioner's brief a quotation is given from page 285 of "The Struggle for Judicial Supremacy" by Robert H. Jackson, now Mr. Justice Jackson, which contains the sentence: "The presumption of validity which

attaches in general to legislative acts is frankly reversed in the case of interferences with free speech, free press and free assembly, and for a perfectly cogent reason."

No citation of court decisions is given in support of this statement. The "cogent reason" referred to seems to be that free speech, free press and free assembly constitute channels of opinion and of peaceable persuasion, which cannot be readily corrected by the processes of the ballot box, whereas, "ordinarily legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion."

We will not discuss the cogency of the reason further than to call attention to the facts that a majority of the court has apparently not adopted the supposed presumption, and that Mr. Justice Jackson rendered an opinion dissenting from the grounds given by the majority opinion of this court in deciding the Prince case but agreeing with the majority in affirming the judgment of the Supreme Court of Massachusetts and upon the grounds given by that court. The point concerning the *presumption* of validity or invalidity of the statutory provision was mentioned by Mr. Justice Murphy in his dissenting opinion, who (at page 411 of 88 L. ed.) used the language quoted on pages 22 and 23 of petitioner's brief. The thoughts there expressed were not concurred in by a majority of the court. We

conclude, therefore, that the supposed presumption of invalidity or rather as Mr. Justice Murphy expressed it the burden being on the state "to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case" did not fail to receive the attention of the court and that the majority of the court adhered to the long standing and well founded presumption that the legislative branch of the government acts upon adequate information and for a proper objective.

The case of *Busey v. Dist. of Columbia,* 138 F. (2d) 592, at page 595 weakly supports petitioner's point under circumstances where the validity or invalidity of an ordinance provision is dependent on certain facts which appear to be no more probable than improbable and when the proof concerning the facts is more readily available to the one maintaining validity of the ordinance, as was the case there under consideration where the validity or invalidity of the ordinance depended upon the fact whether the license fees were substantially more than the cost of policing. What was there said has no application to the ordinance here in question where there is no claim of invalidity because of a license fee,—and in fact there is no fee.

The petitioner seems to confuse the presumption of proper action on the part of the legislative authority with the "clear present danger" rule followed by this court in

some of the cases, especially in *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 87 L. ed. 1628, and see especially pages 633 and 634 of 319 U. S. This rule, as we understand it, is to the effect that under our system of free speech and expression of opinions, legislation restricting expressions of opinion is unreasonable and invalid unless it is confined to circumstances which are such as to indicate a present danger to the public welfare. In other words, the individual has a right to entertain his own thoughts and to voice or publish his thoughts free of legislative restriction unless in doing so he brings about a present danger detrimental to the public welfare.

This rule does not raise any presumption of statutory invalidity. It merely serves as a guidepost along the road of judicial activity. In so far as the rule has any application in a case like the one here at bar, it supports the ordinance rather than condemns it, as we think, for the reason that the ordinance discloses on its face a clear present danger which concerns the public welfare. Children who stand like statutes on a street for hours at a time holding out a magazine whether acting under compulsion or by their own free will as the result of indoctrination are far less likely to develop a robust constitution and a mental attitude which will make for good citizenship than children who are permitted to play with other children and thus gain physical strength, mental alertness, a spirit of cooperation, and a

friendly attitude toward others. Moreover, children who stand on the streets are in danger of physical injury; they learn many evils of the world which may corrupt or warp their minds through life; they fail to get the friendly and social attitude which comes by association with other children and in the home life.

We observe more that children posted along crowded streets make the streets less convenient for ordinary use because adults must take extra care to avoid rudeness or injury to the children.

The thought has often been expressed that Jehovah's Witnesses by offering for sale magazines and books printed by Watchtower Bible and Tract Society are preaching and practicing religion. At pages 6 and 7 of the petition this thought is advanced and it is said that the work "is carried on by Jehovah's Witnesses in the public interest without hope of pecuniary return to any individual or group of individuals."

The record of this case, however, shows that their activity is not religious; it is not without hope of pecuniary return, and it is not carried on in the public interest; that they are most vehemently opposed to all religions and to our government as well as to all other governments; that they acknowledge no allegiance to any government except the Theocratic Kingdom which as they maintain was started

in 1914 and which will achieve its full objective as a result of the great Armageddon which is soon to happen.

We call attention to the testimony of the petitioner who when on the witness stand was questioned concerning the books entitled "Enemies", "Religion" and "Government". She testified that these books represent not only a part of the views of Jehovah's Witnesses but, as she said "It is the views of Jehovah's Witnesses. It is the truth. It is the physical facts alongside the prophecies." (Tr. pp. 59-60). These books were offered and received in evidence. The book entitled "Enemies" contains statements as follows:

(Page 118): "The Devil was the originator of religion, and the Devil is the father of lies and a 'murderer from the beginning' and ever thereafter. * * *."

(Page 130): "There is no such thing in existence as 'the Christian religion', because all religion proceeds from God's enemy, the Devil. 'Christian religion' is a misnomer, fraudulent and deceptive."

(Page 174): "What is the soul? It is a living, breathing creature. Every man is a soul, but no man possesses a soul. * * * By what authority is the claim made that death is merely the separation of the body and soul and that the soul lives on? That claim is based wholly on the Devil's lie. * * *."

(Page 204): "Politics and commerce, added to religion, form the elements of Satan's organization."

(Page 221): "Religion has been a means employed by the Devil to build his mighty organization on earth, which has deceived millions; and religion and religion-

ists, according to the prophecies of God, will be the first of Satan's organization to be destroyed at the beginning of Armageddon."

(Pages 326 and 327): "The word 'Armageddon' means the place of assembly of troops, that is, where God's people are, and Satan gathers his forces together to destroy them. Knowing his time is short, Satan is hurrying his forces on for the conflict; and concerning this it is written: 'And I saw three unclean spirits like frogs come out of the mouth of the dragon, and out of the mouth of the beast, and out of the mouth of the false prophet. * * *.'"

"The term 'beast' here used symbolically stands for the governments of the nations of the earth, particularly of 'Christendom', which are beastly and cruel. * * *."

(Page 351): "All the wars combined that have ever afflicted mankind cannot be compared to what Armageddon will bring upon the world in the way of trouble."

Judge Walter L. Tooze, before whom the case was tried in the Circuit Court, took the trouble to write a long opinion which is printed at pages 143-226 of the transcript,—appellant's abstract, where, at pages 163-169, quotations are given from the book on "Government". We ask, however, that the court in the event of considering this phase of the case examine the three books, "Religion", "Enemies" and "Government" and note the illustrations concerning government and religion. They are plaintiff's exhibit 4.

The petitioner was asked: "Suppose there is a conflict between what you term God's law and man made law, which would you abide by? A. * * * I would abide by God's law, because we recognize—even the President of the United States takes an oath on the Bible, and therefore we recognize the Bible as the highest law governing man. Therefore, we will obey God rather than man. The Court: Then do you carry that to the extent of obeying God as you yourself interpret God's word? A. I don't know whether I just understand you, your Honor. We obey all the laws of the land that are not in conflict with God's law. The Court: But who determines—A. The Scriptures answer that. * * *. The Court: Then it is your determination, isn't it? A . That is right, as a Christian." (Tr. pp. 45-49).

From the above it will be seen that Jehovah's Witnesses not only recognize no religion but are most strenuously opposed to all religions and to all governments other than the Theocratic Kingdom. This Kingdom as they conceive it is not a spiritual kingdom in Heaven but a kingdom on this earth which will have full control when the government of the United States and the governments of other nations are overthrown as a result of the great battle of Armageddon, when all those who believe in religion and in government as administered in this and in other countries will be utterly destroyed and Jehovah's Witnesses will be vested with lives of everlasting happiness.

The Theocratic Government, as conceived by them, tolerates no lack of fealty. They must be loyal to it and to no other government. This explains more fully why they so strenuously refuse to salute our flag, to pledge allegiance to our country, to take part in any governmental effort, or aid in the national defense even though our country be in the greatest danger of being overrun by the most brutal of mankind. (Here compare *Race v. United States,* 129 F. (2d) 204, 209, *United States v. Mroz,* 136 F. (2d) 221, 225, 226, petition for writ of certiorari denied in 320 U. S. 805).

As concerns the statement that the work of Jehovah's Witnesses is in the public interest without hope of pecuniary return we maintain from the above that their work is not in the public interest. Although by reason of our liberality we tolerate it when performed by adults, when they press little children into the service of standing on crowded public streets for long periods in order to present magazines for sale, we most emphatically believe that in the interest of the public welfare our spirit of liberality should be stayed.

The record of this case shows, moreover, that Jehovah's Witnesses do have hope of pecuniary return when standing on the streets holding up the magazines to the public and carrying a bag which prominently shows that the magazines are for sale at 5c per copy. The evidence shows that the petitioner pays 2½c per copy at the time of receiving the

magazines; that she obtains 5c per copy from those who "are of good will" and buy; that she and other workers obtain donations from persons "of good will", and that no accounting for the money thus received is required or expected by Watchtower Bible and Tract Society. (See Testimony of Norman Larson who is known as "the company's servant" and who acts in the capacity of a representative of the Watchtower Bible and Tract Society, the printing house which furnishes the magazines, in the matter of delivering the magazines to Jehovah's Witnesses and collecting 2½c in cash per copy at the time of making delivery, Tr. "Appellant's Abst." pp. 113-132,—especially pp. 111-115).

Mr. Justice Cardozo when writing a concurring opinion in *Hamilton v. University of California*, 293 U. S. 245, said (page 268, 355 of 79 L. ed.):

> "The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right to private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."

And in *Jones v. Opelika,* 316 U. S. 584, 86 L. ed. 1691, Mr. Justice Reed, who wrote the opinion for the court, said (page 594 of 316 U. S.):

> "Too many settled beliefs have in time been rejected to justify this generation in refusing a hearing to its own dissentients. But that hearing may be limited by action of the proper legislative body to times, places and methods for the enlightenment of the community which, in view of existing social and economic conditions, are not at odds with the preservation of peace and good order."

What we have here said is not with a view of antagonizing Jehovah's Witnesses or minimizing the freedoms which are vouchsafed by our federal and state constitutions, but with the hope of showing that our constitutions and government are not so defective as to exempt Jehovah's Witnesses or any other organization from statutory or ordinance provisions like those here considered and thus permit them to carry on a course of conduct that will subject children to a service which endangers their health, safety and morals, and which impairs their development into able-bodied, alert, active, reasonably tolerent and capable men and women,—even though our constitution permits the mothers and others to teach the children that the government under which they live and enjoy a free education and a large measure of liberty is a "beast" which is soon to be destroyed.

In conclusion we earnestly maintain that the petition presents no substantial question which was not passed upon by this court in the Prince case; that the points relied upon by the petitioner have been determined adversely to the petitioner in other cases before this court, and that a cursory examination of the facts as disclosed by the record accompanying the petition will show that the petition is without merit and should be denied.

Respectfully submitted,

LYMAN E. LATOURETTE,
City Attorney,

JOSEPH O. STEARNS, JR.,
Acting Chief Deputy City Attorney,
Attorneys for Respondent.